NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL CURTIS PEMBERTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

VIRGINIA L. GRADY
Federal Public Defender

JOHN C. ARCECI
Assistant Federal Public Defender
Counsel of Record for Petitioner
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

QUESTION PRESENTED

Whether the good-faith exception to the exclusionary rule, articulated by this Court in *United States v. Leon* in the context of a law enforcement officers' objectively reasonable reliance on a warrant, can be extended to evidence collected from a warrantless arrest?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PETITION FOR A WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTION 1

FEDERAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 9

APPENDIX

Decision of the United States Court of Appeals for the Tenth Circuit..... A1

Order denying petition for rehearing en banc A11

Order extending time in which to petition for writ of certiorari A12

TABLE OF AUTHORITIES

Page

Cases

Arizona v. Evans, 514 U.S. 1 (1995) 5

Davis v. United States, 564 U.S. 229 (2011) 5

Herring v. United States, 555 U.S. 135 (2009) 5

Illinois v. Krull, 480 U.S. 340 (1987) 5

James v. Illinois, 493 U.S. 307 (1990) 4

McGirt v. Oklahoma, 591 U.S. 894 (2020) 2

Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) 8

United States v. Herrera, 444 F.3d 1238 (10th Cir. 2006) 6

United States v. Jones, 701 F.3d 1300 (10th Cir. 2012) 7

United States v. Katzin, 769 F.3d 163 (3d Cir. 2014) 8

United States v. Leon, 468 U.S. 897 (1984) 4

Statutes

18 U.S.C. § 1153 3

18 U.S.C. § 3231 1

18 U.S.C. § 3742 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

Other Authorities

Wayne R. LaFave, *et al.,* 1 Search & Seizure § 1.3(g) (6th ed.) 8

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Paul Curtis Pemberton, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on March 4, 2024.

OPINION BELOW

The published decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Pemberton*, 94 F.4th 1130 (2024), is found at Appendix A1.

JURISDICTION

The United States District Court for the Eastern District of Oklahoma had jurisdiction in this criminal case under 18 U.S.C. § 3231 and § 1153. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and entered judgment on March 4, 2024, and denied Mr. Pemberton's petition for rehearing en banc on May 28, 2024. (Appendix at A1, A11.) On August 21, 2024, this Court extended the time in which to file a petition for writ of certiorari to October 25, 2024. (*Id.* at A12.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL PROVISION INVOLVED

U.S. Const. amend. IV, provides in full, that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Defendant Paul Curtis Pemberton is an enrolled member of the Creek Nation and an Indian under federal law. (Appendix at A1.) His case, which involves a homicide in McIntosh County, Oklahoma that was investigated by state, not federal, authorities, is among those impacted by *McGirt v. Oklahoma*, 591 U.S. 894 (2020). (*Id.*)

In 2004, a McIntosh County Sheriff Deputy responded to a 911 call from Mr. Pemberton's father indicating that Mr. Pemberton had shot his stepmother. (*Id.* at A2.) A deputy arriving at the residence found Mr. Pemberton sitting on a truck's tailgate, and immediately drew his weapon and ordered Mr. Pemberton to the ground, handcuffing and searching him. (*Id.*) Thereafter, additional officers arrived at the scene, followed by the County's Sheriff himself, who lived down the road and to whom Mr. Pemberton later made incriminating statements. (*Id.*) After being transported to the county jail, Mr. Pemberton made further incriminating statements while being interrogated by an Oklahoma State Bureau of Investigation agent. (*Id.*) An Oklahoma state judge later authorized a warrant to search Mr. Pemberton's truck, in which ammunition was located. (*Id.*) Ultimately, he was convicted of murder in Oklahoma state court. (*Id.*)

The problem, however, is that McIntosh County straddles the Creek Nation and the Cherokee Nation reservations and is, therefore, Indian Country. (*Id.* at A1.) The Major Crimes Act, 18 U.S.C. § 1153, confers exclusive *federal* jurisdiction over any

Indian (like Mr. Pemberton) who is accused of committing murder within Indian Country. *(Id.*) And here, because the murder, relevant investigation, and Mr. Pemberton's arrest occurred within Indian Country, it should have been investigated by the federal government (not the state, as occurred here) and prosecuted in federal court (and not state court, as occurred here). (*Id.*)

After *McGirt*, the federal government did ultimately charge Mr. Pemberton for the 2004 murder. (*Id.* at A2.) Before that federal trial, Mr. Pemberton moved to suppress all evidence gathered and statements obtained during the 2004 state investigation because state and county authorities lacked jurisdiction to investigate and prosecute the crime. (*Id.*) The district court denied the suppression motion, concluding, as relevant here, that the good-faith exception applied to the arrest and investigation, preventing application of the Fourth Amendment's exclusionary remedy. (*Id.* at A2-A3) Thereafter, Mr. Pemberton was convicted at a trial at which prosecutors relied on the same evidence developed in 2004 by state law enforcement officers and sentenced to life imprisonment. (*Id.* at A3.)

On appeal, he challenged the district court's suppression denial. (*Id.* at A2-A3.) The government conceded that *McGirt* settled the question that state and county officers acted outside their jurisdiction, but it argued that the district court correctly declined to suppress the evidence. (*Id.* at A3, A6.) A panel of the Tenth Circuit affirmed, determining that application of the exclusionary rule was not an appropriate

remedy for the "concededly unconstitutional" police conduct. (*Id.* at A6-A7.) As relevant here, the circuit recognized that while it had never done so previously, it saw "no reason not to extend the good-faith exception to the warrantless arrest here." (*Id.* at A6.) The en banc court declined to hear the case, and this petition follows.

REASONS FOR GRANTING THE WRIT

At this stage, there is no dispute that a Fourth Amendment violation occurred when state officers arrested and investigated Mr. Pemberton for murder without a warrant. (*Id.* at A3.) Ordinarily, a remedy exists for that violation by invoking the exclusionary rule to exclude the Government's introduction of all unlawfully seized evidence flowing from that illegality as direct evidence against the defendant in a criminal prosecution. *See James v. Illinois,* 493 U.S. 307, 311 (1990). In *United States v. Leon,* however, this Court adopted a 'good-faith exception' to the application of the exclusionary rule, specifically applying that exception where "an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope," even though the search warrant was later deemed to be invalid. 468 U.S. 897, 920-21 (1984). For at least three reasons, this Court should review the Tenth Circuit's extension of the good-faith exception to the *warrantless arrest* that occurred here.

First, the decision below is in tension with *Leon* and its progeny. *Leon*, as noted, dealt with a situation where a magistrate mistakenly issued a search warrant without probable cause, and officers acted in an objectively reasonable manner by relying on that warrant. 468 U.S. at 905, 913-14. Thereafter, in *Illinois v. Krull*, 480 U.S. 340 (1987), this Court applied the good-faith exception to a situation where officers conducted a search in good faith, not on a warrant erroneously issued, but rather on a statute's regulatory scheme permitting warrantless administrative searches where the statutory scheme was later declared unconstitutional. 480 U.S. 340, 343-346, 353-57 (1987). That is, officers relied not on a magistrate's mistake, but on a legislature's in enacting an unconstitutional statute. Later, this Court indicated that *Leon*'s exception to the exclusionary rule also applied where an "officer [had] acted in reliance on a police record indicating the existence of an outstanding arrest warrant," if that error was made by a court clerk's employee rather than a police officer. *Arizona v. Evans*, 514 U.S. 1, 3-4, 14-16 (1995); *see also Herring v. United States*, 555 U.S. 135 (2009). And in *Davis v. United States*, the Court found that good faith could be applied to "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." 564 U.S. 229, 231-32 (2011).

But as even the Tenth Circuit previously has recognized, *Leon* and its progeny do not represent a categorical end-run around the Fourth Amendment, countenancing without consequence every unconstitutional law enforcement action. *See, e.g.*, *United States v. Herrera*, 444 F.3d 1238, 1249 (10th Cir. 2006). Rather, the good-faith exception "generally applies only narrowly outside the context of a warrant." *Id.* As such, "[i]n light of this very narrow application of *Leon's* good-faith exception," the Tenth Circuit previously had indicated it was "disinclined to extend that exception" to new situations, including where, as there, an officer misunderstood the scope of his authority to act under a state's warrantless administrative search provision. *Id.* at 1251–52. Notwithstanding that prior caution, the panel decision here extends the good-faith exception far beyond its moorings to warrantless arrests and investigations. In doing so, it stands in stark tension with *Leon* and its progeny, a tension this Court's review is necessary to resolve.

Second, the panel decision also stands in conflict with an earlier Tenth Circuit decision, and because the en banc court did not resolve that conflict, this Court should. Specifically in *Ross v. Neff*, the circuit previously had recognized that a "warrantless arrest executed outside of the arresting officer's jurisdiction is analogous to warrantless arrest without probable cause," and therefore "presumptively unreasonable." *Ross v. Neff*, 905 F.2d 1349, 1354 (10th Cir. 1990). Decided 14 years

before the events of this case, *Ross* renders a jurisdiction-lacking arrest and investigation, as occurred here, objectively unreasonable.

The panel decision below cautioned that other panels of the Tenth Circuit had "subsequently limited *Ross*," cabining it to "no further than the unique factual circumstances that spawned it: that is, a warrantless arrest by state police on federal tribal land." (Appendix at A6.) But that *was* the situation presented here, and, as such, *Ross* should have applied. And while prior panels had sought to limit the reach of *Ross*, the court also had necessarily recognized that the case "remains good law," at least as so narrowed. *See United States v. Jones*, 701 F.3d 1300, 1311-12 (10th Cir. 2012). Because the circuit declined to apply the rule from *Ross* here, where the same overarching circumstances were presented—a "warrantless arrest by state police on federal tribal land"—and because the en banc court declined to resolve the discrepancies across the circuit's applications of the *Ross* rule, this Court should step in to do so. Such intervention would, of course, provide clarity on this important issue across all circuits, not simply in the Tenth.

Third, the question is one of exceptional importance, which continues to cause uncertainty among commentators and the lower courts. The leading criminal law treatise, for instance, has argued that "a broader good faith exception is neither a desirable nor a necessary step . . . ." Wayne R. LaFave, *et al.*, 1 Search & Seizure

§ 1.3(g) (6th ed.) (discussing how the good faith exception has not yet been applied to warrantless searches and seizures beyond the "rather special situations" presented by post-*Leon* cases). And unsurprisingly, this question of how far the exception can be extended has challenged—and split—other courts as well. *See, e.g.*, *United States v. Katzin*, 769 F.3d 163, 167, 187 (3d Cir. 2014) (en banc) (splitting 8-5 in determining that evidence obtained through warrantless surveillance was admissible under the good faith exception to the exclusionary rule).

But at base, review is warranted because this Court has not extended the reach of the good-faith exception that it created nearly as broadly as the panel decision below does. Accordingly, just as it did forty years ago to announce the good-faith exception in *Leon*, the Court should grant review in this case to say for itself whether that exception indeed applies as broadly as the Tenth Circuit believed. *Cf. Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

/s/ John C. Arceci
JOHN C. ARCECI
Assistant Federal Public Defender
Counsel of Record
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

October 25, 2024